

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PUREWICK CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 22-102 (MN)
	)	
SAGE PRODUCTS, LLC,	)	
	)	
Defendant.	)	
	)	

**ORDER AFTER PRETRIAL CONFERENCE**

AND NOW, this 23rd day of February 2024, after a Pretrial Conference and upon consideration of the Proposed Pretrial Order (D.I. 213) and the discussion at the February 20, 2024 Pretrial Conference (D.I. 225), IT IS HEREBY ORDERED that:

1. The Proposed Pretrial Order is ADOPTED as modified by any discussion at the Pretrial Conference.
2. A five-day jury trial will begin on February 26, 2024 at 9:30 a.m. with jury selection. Subsequent trial days will begin at 9:00 a.m. Each side should be prepared to present its case until 4:30 p.m. each trial day, although the end of the trial day may, at the discretion of the Court, be earlier or later than 4:30 p.m. The bench trial will take place during the week while the jury is deliberating or after it has been dismissed, and/or on March 4 or March 6, 2024.
3. The trial will be timed. The jury trial will be split into phases. Phase 1 will include infringement and validity. Phase 2 will include willfulness and damages. To the extent that Plaintiff argues that evidence relating to inducement overlaps with evidence relating to willfulness, the issue of inducement will go forward in Phase 2 as well.

4. Each side is allowed up to ten (10) hours total for the two phases of the jury trial. This includes opening statements, direct and cross-examinations of witnesses, closing arguments, and argument of evidentiary issues. In addition, each side may have up to two (2) hours and 30 minutes to present its case to the bench, including opening statements, direct and cross-examinations, closing arguments, and argument of evidentiary issues. The Court will not mandate that each side shall reserve specific time for closing arguments to the jury, but requests the counsel use their best judgment to ensure that sufficient time is left for closing argument(s). Time during the trial day that does not neatly fit into one of the stated categories will be attributed to one side or the other as the Court deems appropriate.

5. Issues that need to be addressed outside the presence of the jury will be taken up at 8:30 a.m., at the lunch break, at the end of the day, or at such other time that the Court determines. Those issues – including objections to anticipated exhibits or demonstratives – must be brought to the attention of the Court’s Judicial Administrator and Courtroom Deputy by 7:00 a.m. on the day on which the evidence objected to will be adduced. There will be thirty to forty-five minutes for lunch and a fifteen-minute break in the morning and in the afternoon.

6. As discussed at the Pretrial Conference, both parties’ requests for leave to move for summary judgment (D.I. 153 & 154) are DENIED.

7. As discussed at the Pretrial Conference, Defendant’s request for a stay of proceedings pending its appeal of *PureWick I* (D.I. 201) is DENIED.<sup>1</sup>

8. As discussed at the Pretrial Conference, the Court reserved ruling on the claim construction disputes raised in the parties’ *Daubert* motions and ordered the parties to provide

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<sup>1</sup> Defendant previously requested a stay (D.I. 19), which the Court denied (D.I. 135). Defendant’s appeal of *PureWick Corp. v. Sage Products, LLC*, No. 19-cv-1508-MN (D. Del.) is pending before the Federal Circuit (No. 24-1184).

additional briefing. The Court will hear argument on those issues on Monday February 26, 2024. Otherwise, for the reasons stated at the Pretrial Conference, Plaintiff's Motion to Exclude Improper Claim Construction Opinions by Sage's Expert (D.I. 158) and Defendant's Motion to Exclude and Strike Portions of Opinions and Testimony of PureWick's Experts John Collins and Arrigo Jezzi (D.I. 155) are GRANTED-IN-PART and DENIED-IN-PART.

9. For the reasons stated at the Pretrial Conference, Plaintiff's Motion *in Limine* No. 1 (D.I. 213, Schedule F1) is GRANTED,<sup>2</sup> Plaintiff's Motion *in Limine* No. 2 (D.I. 213, Schedule F2) is GRANTED, Plaintiff's Motion *in Limine* No. 3 (D.I. 213, Schedule F3) is DENIED, Defendant's Motion *in Limine* No. 1 (D.I. 213, Schedule F4) is GRANTED as to phase 1,<sup>3</sup> Defendant's Motion *in Limine* No. 2 (D.I. 213, Schedule F5) is DENIED, and Defendant's Motion *in Limine* No. 3 (D.I. 213, Schedule F6) is GRANTED-IN-PART.

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<sup>2</sup> Plaintiff's second motion *in limine* seeks to preclude Defendant from presenting evidence or argument of a good faith belief that PrimaFit 2.0 does not infringe. Based on the parties' briefing and argument at the Pretrial Conference, Defendant does not appear to have disclosed during discovery and could not proffer what evidence it would elicit to show that Sage had a subjective belief when it developed and sold PrimaFit 2.0 that it would not infringe or that the asserted patents are invalid. If (as is unclear after the oral argument) Sage intends to elicit materially new testimony from a witness at trial, this would be improper, as Sage had an obligation to disclose evidence of its subjective intent during discovery. If nothing materially new is to be expected at trial, then the record will continue to lack the required linking evidence that Sage relied on advice of counsel and actually believed that PureWick's patents would be found invalid or that Sage's product would be found not to infringe those patents. *Power Integrations, Inc. v. Fairchild Semi. Int'l*, No. 08-309, 2018 WL 5631531, at \*1 (D. Del. Oct. 31, 2018).

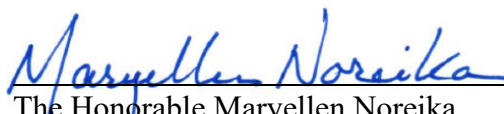
<sup>3</sup> The Court recognizes that during the Pretrial Conference it initially denied Sage's motion, allowing PureWick to make a product-to-product comparison in support of infringement. Having reviewed the original briefing as well as the supplemental submissions, the Court will now grant Sage's motion as to phase 1. PureWick did not clearly argue in its response to the motion *in limine* that the findings of the first trial are relevant to infringement (but rather focused on willfulness). Moreover, the Court finds that although the comparison of the new product to the one found to be infringing may be probative as to some claims, the prejudice to Sage of making that comparison and the likelihood of jury confusion would outweigh the probative value.

10. Sage's objection to PureWick's supplemental exhibit and witness list is OVERRULED. Although Sage represents that it will not argue that the presence of a space where urine can collect (the reservoir) in the accused devices is due to manufacturing variances, the Court will allow the supplementations to the extent that some version of that argument may arise at trial.

11. PureWick's request that the Court find collateral estoppel applies to four issues: Sage's knowledge of the asserted patents, PureWick's ownership of the asserted patents, that PureWick practices the asserted patents and that the PrimaFit2.0 includes a wicking material is DENIED as untimely. Although the Court is denying PureWick's request, it should be beyond dispute that, *e.g.*, Sage had knowledge of the patents. To the extent that Sage disputes issues at trial that should not fairly be subject to dispute, the Court may reallocate trial time from Sage to PureWick.

12. As explained at the Pretrial Conference, the parties may not provide witness binders or physical copies of documents (demonstratives, deposition transcripts, etc.) to the Court, but the parties must provide witness binders to the witnesses. Additionally, at the beginning of each trial day, the parties shall provide to the Court's Judicial Administrator and Courtroom Deputy electronic copies of witness folders containing the exhibits and demonstratives (if any) to be used on direct examination and cross-examination<sup>4</sup> of any witnesses expected to be called that day.

13. Any trial logistics should be coordinated through the Courtroom Deputy.

  
The Honorable Maryellen Noreika  
United States District Judge

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<sup>4</sup> This includes any deposition transcripts or expert reports to be used with witnesses.